Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.202(b)	)	MM Docket No. 02-124
Table of Allotments	)	
FM Broadcast Stations	)	
(Amboy, California)	)	

TO: Assistant Chief, Audio Division
Media Bureau

REPLY TO OPPOSITION TO
MOTION FOR LEAVE TO FILE RESPONSE

1. Cameron Broadcasting, Inc. ("Cameron") hereby replies to the Opposition filed by Infinity Radio Operations, Inc. ("Infinity") relative to Cameron's Motion for Leave to File Response in the above-captioned matter.

2. To recap briefly, Infinity moved to dismiss Cameron's counterproposal in the captioned proceeding. Cameron opposed that motion, and Infinity replied to Cameron's opposition.

3. In its Reply, Infinity gratuitously suggested, out of the blue, that Cameron may not have conducted a "search of the database" prior to preparing and filing its counterproposal. Infinity Reply at 3. In making that argument, Infinity did not clarify which "database" it was referring to, but from the context of the pleading it appeared to be a reference to the "FCC database" alluded to elsewhere in Infinity's Reply. Infinity's argument on this point appears to have been that Cameron was somehow remiss in failing **to** discover **an** earlier filed, conflicting

proposal ("the Marathon Counterproposal", which was filed in August, 2001 in MM Docket No. 01-135).

4. But the Commission's records demonstrate beyond argument that the Marathon Counterproposal had not been entered into the Commission's database at the time that Cameron's counterproposal was filed. That fact punctures Infinity's balloon on that point, and Cameron believed that it was appropriate for the Commission to be aware of the plain inaccuracy of Infinity's premise.

5. Also in its Reply, Infinity characterized an earlier Commission decision as "summarily" disposing of an earlier counterproposal ("the Searchlight Counterproposal", which was filed in May, 2001 in MM Docket No. 01-69). Since that "summary" disposition came more than a year after the initial submission of the counterproposal in question, Cameron believed it important to question the propriety, and accuracy, of Infinity's characterization.

6. Also in its Reply, Infinity suggested that, because the Searchlight Counterproposal had not been entered into the FCC database, other parties -- including Marathon, the proponent of the Marathon Counterproposal which happened to conflict with the Searchlight Counterproposal -- could not have known about the pendency of the Searchlight Counterproposal. The further suggestion was that this supposedly justifiable ignorance might excuse the filing of the Marathon Counterproposal,

7. But again, whether or not omission from the database may have hidden the Searchlight Counterproposal from *some* **folks,** the Searchlight Counterproposal was unquestionably ***not*** hidden from Marathon's counsel, as he sought to have the Searchlight Counterproposal dismissed in detailed reply comments filed just three months before the Marathon Counterproposal was filed. And, while that detail might not have been widely-known,

it was clearly known to Infinity, as Infinity, too, opposed the Searchlight proponent's efforts in MM Docket No. 01-69. Since Infinity seemed to be arguing that Marathon might have been understandably and unavoidably ignorant of the Searchlight Counterproposal, and since Infinity plainly knew that Marathon, or at least its counsel, was not at all ignorant of that counterproposal, Cameron believed it important that the record reflect the facts, and not Infinity's disingenuously inaccurate suggestions.

8. Curiously, Infinity opposes Cameron's motion to set the record straight.

9. With respect to Cameron's observation that the Marathon Counterproposal had not been placed in the Commission's database (contrary to Infinity's claim), Infinity does not dispute the truth of Cameron's demonstration. Infinity does profess that "Infinity does not know what database failed to reference the [Marathon Counterproposal]". Infinity Opposition at 2. But it was Infinity which first suggested that the inclusion of the Marathon Counterproposal in the Commission's database should have put Cameron on notice -- that is, it was Infinity which first raised the notion of "database" inclusion as a relevant consideration. For Infinity now to say that it doesn't know what database was involved is a bizarre argument, at best, since the matter of database availability was raised by Infinity. Infinity's odd argument certainly does not respond to Cameron's claim.

10. With respect to Infinity's use of the descriptive "summarily", Infinity assumes the mantle of lexicographer, explaining that the term has "a substantive, as well as a temporal, sense." Infinity Opposition at 3. Cameron takes this to be a concession that the Commission's year-long deliberations prior to dismissal of the Searchlight Counterproposal could not be deemed to be "temporally" summary -- in other words, Infinity appears to be conceding that Cameron was correct.

11. And while the concept of "summary" may have a "substantive" component, a "summary" decision in that sense would normally be one in which essentially no substantive consideration is given. For example, when the Supreme Court denies a petition for certioriari with an order stating, *in its entirety,* "The petition is dismissed", *that* is "summary" treatment. It would appear to Cameron that the four-page report and order **(DA** 02-1249, released May 24, 2002) dismissing the Searchlight Counterproposal after thoughtful consideration of various aspects of that counterproposal is not "summary" in that regard.

12. With respect to the fact that Marathon's counsel clearly had knowledge of the Searchlight Counterproposal before filing the Marathon Counterproposal, Infinity has no real answer, other than to accuse Cameron **of** making an inappropriate "*ad hominem*" attack on "a respected member of the bar" (presumably referring to Marathon's counsel). Infinity Opposition at **3.**

13. Cameron made no such attack, and intended no such attack -- any more than Infinity intended to personally attack Cameron and its counsel for supposedly failing to check the database (even though such a check would not have alerted Cameron to the pendency of the Marathon Counterproposal), or any more than Infinity now intends to attack Cameron and its counsel for supposedly making an inappropriate *ad hominem* attack.

14. Cameron merely sought to have the record reflect the facts. And whether an ***an*** *hominem* attack has occurred or not, the fact remains that Marathon's counsel and Infinity both were well aware of the Searchlight Counterproposal in 2001, and they were both aware of each other's awareness then as well.

15. Not content to stay within the proper limits of an opposition pleading, Infinity closes its Opposition with a citation to a January **8,** 2003 decision which, according to Infinity, "applies

a bright line test" that "compels dismissal of Cameron's counterproposal". Infinity Opposition at **4.** Since Infinity has raised this claim, Cameron is constrained to respond.

16. The decision cited by Infinity -- *i.e., Wisner, Ruston, Clayton and Saint Joseph, Louisiana,* MM Docket No. 01-19, **DA** 03-17, released January 8,2003 -- does indicate that a pending counterproposal, even if flawed, precludes subsequently filed but mutually exclusive counterproposals. But that doesn't help much in this situation, because Infinity is asserting that Cameron's counterproposal should have been dismissed because of the pendency of the Marathon Counterproposal -- but the Marathon Counterproposal was itself mutually exclusive with the earlier-filed Searchlight Counterproposal and thus should not have been pending in the first place.

17. This situation highlights a flaw in the Commission's procedures which, if left uncorrected, will invariably lead to substantial confusion, delay, uncertainty and inefficiency in the allotment process. It is one thing to claim that, as a "bright line" matter, pending proposals preclude later-filed, mutually exclusive proposals. But when is a proposal deemed to be "pending" in this context? Unless the Commission has some means of apprising the public in a prompt and uniform manner of when a proposal is "pending" and is, therefore, blocking any mutually exclusive proposals, the Commission is inviting precisely the scenario which confronts it in the Searchlight/Tecopa/Pahrump situation here.

18. It appears to be universally recognized that the Searchlight Counterproposal (in MM Docket No. 01-69) was timely and not mutually exclusive with any other then-pending proposal. Thus, under the authority which Infinity now claims to be controlling, when the Marathon Counterproposal (in MM Docket No. 01-135) -- which is also universally recognized as having been mutually exclusive with the Searchlight Counterproposal -- was filed three

months later, the Marathon Counterproposal should have been dismissed summarily (using that term in both its temporal and substantive senses).

19. But the Marathon Counterproposal was not summarily dismissed. Instead, it was allowed to linger in the Commission's files, but not entered into the database, for a year.

20. During that time the Searchlight Counterproposal was dismissed, after which the Cameron Counterproposal -- which would have been mutually exclusive with the Searchlight Counterproposal, had it not already been dismissed -- was submitted. Having been aware of the Searchlight Counterproposal, and having awaited the dismissal of that counterproposal before advancing its own counterproposal, Cameron played by the rules, since the rules (**see,** *e.g.*, the *Wisner*, ***Louisiana*** decision cited by Infinity) do not appear to contemplate that a late-filed mutually exclusive proposal will be accepted.

21. So now Infinity claims that the Marathon Counterproposal should bar the Cameron Counterproposal. But let's examine that proposition. Infinity's argument, taken to its logical conclusion, means that even if a proposal (let's call it the "Late Proposal") is unquestionably barred by the pendency of an earlier-filed proposal, the Late Proposal may nevertheless shed its flaws and itself secure some protected, preclusive position if, somehow, it manages to stay on file until the earlier-filed proposal happens to be dismissed. But if that's the case, then the Commission has created a ***de facto*** queue system in which proponents are encouraged to submit their proposals regardless of mutual exclusivity with other pending proposals -- because those proponents know that, if they can just keep their heads down and not attract attention, they will acquire a place in a queue which may enable them to avoid dismissal.[1] After all, what harm

[1] Whether a proponent can take specific steps to avoid the watchful eye of the processing staff is not clear -- partly because the internal procedures of the processing staff are not published or widely known.

(Footnote continued on next page)

would there be to a late-filing counterproponent in those circumstances? The worst that might happen would be that the late-filed counterproposal is identified and dismissed. But the upside is that the late-filed counterproposal might get by unnoticed, assuring the late-filer of a place at the head of the line if the mutually exclusive proposal which would otherwise have been a bar happens to be dismissed before anyone focuses on the late-filer.

22. Since the Commission has made much of the aforementioned "bright line" test, the Commission presumably does not wish to endorse, either expressly or implicitly through its actions, such a queue system, since that system would be completely inconsistent with that test. But unless the Commission is prepared to implement some mechanism by which late-filed mutually exclusive proposals are promptly identified and disposed of, the Commission will continue to have a ***de*** *facto* queue system on its hands.

23. Cameron does not have any suggested solutions for this problem going forward. Cameron does submit that it would be extraordinarily unfair and unreasonable for the Commission to penalize Cameron and Marathon by dismissing their proposals under the circumstances presented here. This is especially so in view of the fact, demonstrated in the Supplement filed jointly by those two parties, that both the Marathon Counterproposal and the Cameron Counterproposal can be granted with only minor adjustments to the former.

24. Cameron submits that, under the circumstances presented here, the Commission should acknowledge the flaws in its own system and take immediate steps to correct those flaws.

(Footnote continued from previous page)
Experience and observation suggest that the process of placing counterproposals in the Commission's database has historically been somewhat erratic, which in turn suggests that other aspects of the day-to-day processing of counterproposals may also be erratic in some senses. Whether that fact presents proponents with any opportunity to seek affirmatively to avoid attention is not clear.

But in the meantime, the Commission should accept the revised plan set out in the Marathon/Cameron Supplement and allow those parties to proceed with their respective reallotment proposals.

Respectfully submitted,

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January 28,2003

CERTIFICATE OF SERVICE

I, **Harry** F. Cole, hereby certify that on this 28th day of January, 2003, I caused copies of the foregoing "Reply to Opposition to Motion for Leave to File Response" to be placed in the **U.S.** Postal Service, first class postage prepaid, or hand delivered (as indicated below), addressed to the following persons:

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